Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

HOLYWELL CORPORATION,

Petitioner,

v.

BANK OF NEW YORK and
FRED STANTON SMITH, as Trustee of the
Miami Center Liquidating Trust,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a doctrine of finality based on a mootness ruling, *Miami Center Limited Partnership v. Bank of New York*, 838 F.2d 1547 (11th Cir.), *cert. denied*, 488 U.S. 823 (1988), precludes equitable relief and justice from a bankruptcy court's order confirming a plan procured by fraud.

2. Whether Fed.R.Civ.P. 60(b)(6) provides authority to a court to grant equitable relief and justice from the provisions of a plan that failed to provide for the payment of income taxes, *Holywell Corporation v. Smith*, 503 U.S. 47 (1992), under which property was fraudulently conveyed without consideration to the plan's proponent, and the valid claims of insiders with a priority superior to the liens of the plan's proponent were eliminated pursuant to a provision of the plan for substantive consolidation of the assets of two corporations with two partnerships and an individual.

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PETITION FOR A WRIT OF CERTIORARI

Holywell Corporation,[1] by its undersigned counsel, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS OF OTHER COURTS

The opinion of the Court of Appeals (App. at 1-2) is unreported. The district court's opinion is unreported (App. at 3). The bankruptcy court's order denying Petitioner's Fed.R.Civ.P. 60(b)(6) motion is unreported (App. at 10).

JURISDICTION

The judgment of the court of appeals was entered on May 21, 1999 (App. at 1). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1988).

[1] Petitioner Holywell Corporation was the parent of the Miami Center Corporation and various nondebtor wholly-owned subsidiaries, which were liquidated under the substantive consolidation provision of the confirmed plan of liquidation upon the transfer of substantially all of the corporation's property to Fred Stanton Smith, as trustee of the Miami Center Liquidating Trust, on October 10, 1985.

STATUTORY PROVISIONS INVOLVED

1. Section 1144 of the Bankruptcy Code of 1987, as amended, provides:

> 11 U.S.C. § 1144, *Revocation of an order of confirmation*
>
> On request of a party in interest at any time before 180 days after the date of entry of the order of confirmation, and after notice and a hearing, the court may revoke such order if such order was procured by fraud. An order under this section revoking an order of confirmation shall – (1) contain such provisions as are necessary to protect any entity acquiring rights in good faith reliance on the order of confirmation; and (2) revoke the discharge of the debtor.

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

Rule 60. *Relief from Judgment or Order*, provides, in part:

> (b) MISTAKES; INADVERTENCE; EXCUSABLE NEGLECT; NEWLY DISCOVERED EVIDENCE; FRAUD, ETC. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse

party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from he operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

RULES OF BANKRUPTCY PROCEDURE INVOLVED

Rule 9024. *Relief from Judgment or Order*, provides:

Rule 60 F.R.Civ.P. applies in cases under the Code except that (1) a motion to reopen a case under the Code or for the reconsideration of an order allowing or disallowing a claim against

the estate entered without a contest is not subject to the one year limitation prescribed in Rule 60(b), (2) a complaint to revoke a discharge in a chapter 7 liquidation case may be filed only within the time allowed by § 727(e) of the Code, and (3) a complaint to revoke an order confirming a plan may be filed only within the time allowed by § 1144, § 1230, or § 1330.

STATEMENT

The nature of this case

This case concerns the bankruptcy court's denial of a Fed.R.Civ.P. 60(b)(6) motion filed by Petitioner Holywell Corporation ("Holywell")[2] and Theodore B. Gould[3] after this Court's *Holywell* opinion[4] was issued and after the bankruptcy court held in remanded proceedings, that "the Bank's representations concerning the feasibility of the plan . . . were materially false," *Smith v. Bank of New York*, 161 B.R. 302, 307 (Bkrtcy. S.D. Fla. 1993).

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[2] Holywell was a financial corporation, as defined in the Code of Virginia, § 58.1-418, its income was derived solely from fees, interest, and dividends, and Holywell was *not* engaged in business in the State of Florida

[3] Theodore B. Gould is the beneficial owner of the property transferred to the Miami Center Liquidating Trust which included Holywell's capital stock, 503 U.S. at 56.

[4] The parties to the proceedings, and the provisions of the Bank's plan concerning the creation of the Miami Center Liquidating Trust, are fully described in this Court's *Holywell* opinion, 503 U.S. at 50-51.

This Court's opinion held, in relevant part:

> [t]he Internal Revenue Code ties the duty to pay federal income taxes to the duty to make an income tax return. See 26 U.S.C. § 6151(a) ("when a return of tax is required . . . the person required to make such a return shall pay such tax"). We conclude in this case that the trustee must pay the tax due on the income attributable to the corporation debtors' property because § 6012(b)(3) requires him to make a return as the "assignee" of the "property . . . of a corporation." 503 U.S. at 52.

This Court also found that Holywell was permitted to remain in business under the provisions of the Bank's proposed plan, *Id.* at 51.

The bankruptcy court following remand found that there was no provision for payment of taxes in the Bank's plan,[5] 161 B.R. at 307, and, citing 11 U.S.C.

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[5] During the proceedings before this Court, the Bank argued:

> [I]t would be inequitable to require an individual or entity to file returns and pay taxes *where that individual or entity lacks authority to do so under a reorganization plan sanctioned by the bankruptcy court.* (Emphasis added) The result . . . would require the Liquidating Trustee to *violate the terms of the trust agreement.* . . . (Emphasis added)

Brief In Opposition Of Respondent The Bank of New York, April 30, 1991, at 9-10. Compare, 161 B.R. at 304 ("the order on the bank's cash collateral lien extended only to the net proceeds"). The bankruptcy court's Cash Collateral Order, issued on December 31, 1984, required that Holywell's income taxes be "determined and paid." See 838 F.2d at 1556. (The Bank surrendered $30 million of cash collateral it was holding.)

§ 1129(d),[6] concluded that "[t]he law requires . . . provision for payment."

The bankruptcy court also found that:

> [a]t the closing on the sale of the Miami Center, the Trustee demanded and the bank provided an agreement by which the bank undertook to indemnify the Trustee. . . . The working of the indemnity agreement itself and the more credible testimony presented at trial . . . make clear that the bank agreed to indemnify the Trustee for any liability incurred as a result of implementation of the plan,[7] including

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[6] 11 U.S.C. § 1129(d) provides, in part, that "the court may not confirm a plan if the principal purpose of the plan is the avoidance of taxes."

[7] The bankruptcy court had previously held, in reliance on the Eleventh Circuit's *Miami Center* mootness ruling, relieving the trustee of his lawful duty to pay income taxes:

> For the Court to conclude otherwise would be inconsistent with the recent ruling by the Eleventh Circuit Court of Appeals in *Miami Center Limited Partnership v. Bank of New York*, 838 F.2d 1547 (11th Cir. 1988). The payment of the federal taxes would, of necessity, be an impermissible modification of the confirmed plan. *See* 11 U.S.C. 1127(b); (citations omitted).
>
> As noted by the court in *Miami Center Limited Partnership* when dismissing the appeal, it is legally and practically impossible to unwind the confirmation of this plan or to otherwise restore the status quo. The Court will not allow a "piecemeal dismantling" of a reorganization plan. *See In re AOV Industries, Inc.*, 792 F.2d 1140 (D.C.Cir.1986). The relief sought by the debtors and the government would require the complete dismantling of the substantially

tax obligations imposed by law. . . . 161 B.R. at 305.[8]

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consummated plan, more than two and one-half years after its confirmation.

In re Holywell Corp., 85 B.R. 898, 902 (Bkrtcy. S.D. Fla. 1988).

[8] The Eleventh Circuit's prior judgment, which this Court's *Holywell* opinion reversed, affirmed the bankruptcy court's prior conclusion of law that the trustee was not an assignee of Holywell's property with a statutory duty to pay taxes due on the income attributable to its property, and held:

> The government and the debtors contend that we have jurisdiction to decide this case despite our earlier decision dismissing their appeal of the district court's confirmation of the Plan. According to the government and the debtors, we have jurisdiction . . . to redress BNY's fraudulent act of submitting a plan of reorganization which failed to disclose the absence of any provision relating to the payment of income taxes.
>
> The mootness doctrine, as applied in a bankruptcy proceeding, permits the courts to dismiss an appeal based on its lack of power to rescind certain transactions. (Citations omitted) The mootness standard "is premised upon considerations of finality . . . and the court's inability to rescind . . . and grant relief on appeal." *Miami Center Limited Partnership*, 838 F.2d at 1553 (quoting *In re Sewanee Land Coal & Cattle Co., Inc.*, 735 F.2d 1294 (11th Cir. 1984). In dismissing the debtors' previous challenge, this court was guided by "the important policy of bankruptcy law that court-approved reorganiziation plans be able to go forward based on court approval unless a stay is obtained." *Miami Center Limited Partnership*, 838 F.2d at 1555. Mindful of that policy, we will not entertain any challenge to the Plan which seeks to modify or amend its provisions.

The substantive consolidation of the Bank's plan

The substantive consolidation provision of the Bank's plan provided, in relevant part:

> *As a result of the substantive consolidation of the Debtors,* all Claims between and among the Debtors are *eliminated* by this Plan, including without limitation, all pre-petition claims, *all claims, if any, relating to the ground lease between Chopin and MCLP, all claims, if any, relating to or arising out of the Gould FF&E Leases,* and all claims of reimbursement, subrogation, and contribution between and among all Debtors. (Emphasis added).

Art. II., *Substantive Consolidation,* at 13. The Bank's plan also provided:

> *At the closing BNY or its designee would receive fee title to the FF&E covered by the Gould FF&E Leases, as a result the merger of such leases effected by the substantive consolidation of the estates* (or Gould,

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> *The district court is correct in its ruling that the allegation of fraud is an attempt to modify or alter the Plan and is therefore barred under the mootness doctrine.* (Emphasis added) The allegation seeks to alter the Plan by challenging the terms and provisions which the bankruptcy court and the district court approved. *We also conclude that the allegation concerning the propriety of the bankruptcy court's approval of a plan which makes no express provision for income taxes is an attempt to alter or modify the Plan and is therefore barred.* (Emphasis added) The need for finality requires that we decline to address the merits of these allegations which seek to challenge the court-approved Plan.

In re Holywell Corp., 911 F.2d 1539, 1543 (11th Cir. 1990).

> any of the Debtors, or the Trustee would cause any of the Gould Entities that are Lessors under the Gould FF&E Leases to convey directly to MCLP any FF&E covered by such leases). . . . (Emphasis added)

Art. IV, *Means For Execution Of The Plan*, at 18. The Bank's reference to the "Gould FF&E Leases" is to property leased to the debtor MCLP by Holywell Leasing Company ("HLC")[9] and Holywell Telecommunications Company ("HTC"),[10] both nondebtor wholly-owned subsidiaries of Holywell for which no petition for reorganization was filed under title 11.

The Disclosure Statement to the Bank's plan failed to disclose that the Miami Center Limited Partnership's ("MCLP") liability for the payment of ground rent to Chopin Associates ("Chopin") had a recorded priority *superior* to the Bank's liens, in accordance with the Mortgage, Assignment of Lease And Rents And Security Agreement, dated March 27, 1980, which provided:

> . . . the holder [Bank] of any first mortgage . . . on the Lessee's [MCLP] leasehold estate hereunder and in any event any such mortgage . . . placed on the Lessor's [Chopin] fee estate in the leased premises shall be *subject*

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[9] HLC was incorporated under the laws of the Commonwealth of Virginia in 1976 to lease commercial equipment and was licensed to do business in the State of Florida in 1980.

[10] HTC was incorporated under the laws of the State of Florida in 1981 to develop a wideband integrated voice, video and data telecommunications system based on the installation of fiber optics from Miami, Florida to Washington, D.C.

> *and subordinate to this* [ground] *lease.* (Emphasis added).

The preconfirmation proceedings

The bankruptcy court's order approving substantive consolidation of the debtors' estates under the provisions of the Bank's amended plan held:

> The consolidation of the five estates is for the purpose of allowing all available funds and assets of the estates to be used in accordance with the Bank's Amended Plan, if confirmed, to pay all allowed creditor's [sic] claims.

Bkrtcy. S.D. Fla., July 23, 1985 (unreported).

On August 8, 1985, the bankruptcy court entered an order confirming the Bank's amended plan, without conducting a hearing on confirmation, in violation of 11 U.S.C. § 1128(a),[11] and held:

> Gould's other major criticism of the bank's plan is its provision for a *modified* form of substantive consolidation (Emphasis added). . . . [N]o purpose would be served by a repetition here of the analysis and comments made by the court, on the record at the end of that hearing. 54 B.R. at 43.

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[11] 11 U.S.C. § 1128(a) provides that "[a]fter notice, the court shall hold a hearing on confirmation of a plan." See *National Surety Co. v. Coriell*, 289 U.S. 426, 435 (1932) ("The plan should have been reversed in its entirety because the procedure pursued . . . was improper.").

The bankruptcy court denied objections, without a hearing, in violation of 11 U.S.C. § 1128(b),[12] that the Bank had failed to disclose adequate information concerning the plan's tax consequences, 11 U.S.C. § 1125,[13] and the Bank's plan was not feasible, 11 U.S.C. § 1129(a)(11),[14] on the grounds that the "remaining contentions do not, I think, require discussion." *Id.*

The postconfirmation proceedings

The trustee was appointed[15] after confirmation and commenced distribution under the provisions of the Bank's plan, in reliance on the Bank's indemnity, 6 *supra*, without seeking the bankruptcy court's instructions, with notice to interested parties, concerning the plan's defects, for the purpose of causing the plan's substantial consummation and dismissal as moot of the appeal of the

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[12] 11 U.S.C. § 1128(b) provides that "[a] party in interest may object to confirmation of a plan."

[13] 11 U.S.C. § 1125(a)(1) provides, in part, that " 'adequate information' means information of a kind, and in sufficient detail . . . to make an informed judgment about the plan"; see also H. R. No. 8200, 95th Cong., 1st Sess. (1977) (11 U.S.C. § 1129(a)(2) "requires that the proponent of the plan comply with the applicable provisions of chapter 11, such as section 1125 regarding disclosure.")

[14] See 161 B.R. at 307 (The Bank's representations concerning the plan's feasibility were found by the court to be false.)

[15] On August 12, 1985, Fred Stanton Smith was appointed trustee of the Miami Center Liquidating Trust "for the purpose of the Bank's plan," C.P. No. 916, and the Bank retained authority "to terminate the rights of the Trustee and appoint a new Trustee in his stead." Art. V., *Creation Of Trust*, at 26.

bankruptcy court's confirmation order. Nevertheless, the district court remanded the proceedings, and held:

> It is clear from the record on appeal that here the bankruptcy judge never made the findings of fact necessary to satisfy the requirements of the tests . . . for equitable subordination and substantive consolidation.
>
> There also seems to be a paucity of facts emanating from evidentiary hearings upon which the rulings should be founded.

S.D. Fla., *Holywell Corporation v. Bank of New York*, No. 85-3225-Civ-Aronovitz, December 30, 1985 (Unreported). The district court also denied the Bank's motion to dismiss the appeal as moot and held:

> The order regarding substantive consolidation is clearly not one approving a sale. . . . Should this court rule, after remand of this matter, in favor of the appellants [Holywell] on . . . appeal from the consolidation order, it can grant meaningful relief . . . by reversing the order, and that portion of the confirmed plan of reorganization which incorporates this order. *Id.*

In the remanded proceedings, the bankruptcy judge[16] amended *nunc pro tunc* the bankruptcy court's order

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[16] The original presiding judge was forced to recuse himself in accordance with 28 U.S.C. § 455(a) on August 27, 1987, after an *ex parte* conference with the trustee and his attorney. The bankruptcy judge demanded the dismissal of the trustee's attorney on the grounds that "Mr. Wolff feels that the confirmation order was erroneous, it should not have been entered, that the plan which this Court confirmed is defective. . . . " Bkrtcy. S.D. Fla., *Transcript*, May 15, 1987 at 3.

confirming the Bank's plan and adopted verbatim the Bank's proposed findings of fact and conclusions of law to support the "modified form of substantive consolidation," *In re Holywell Corp.*, 54 B.R. 41 at 43 (Bkrtcy. S.D. Fla. 1985) which had been previously approved, 10 *supra*. The bankruptcy court's amended confirmation order held:

> 62. . . . Because of controlling provisions of Florida law relating to creditors' rights, substantive consolidation under the Bank's plan here does little more than to adopt and implement state law. For example:
>
> (a) In due course, a creditor of MCLP could reach (i) Gould's assets (because of his liability as a general partner), . . . (iii) *Holywell's assets (net of its liabilities),* (emphasis added) *by levying upon Gould's ownership of 100% of the stock of Holywell,* (emphasis added) and (iv) Chopin's assets (net of its liabilities), since it is owned 36% by Gould and 64% by MCC.
>
> 67. . . . the Court finds that substantive consolidation in the *minimal form proposed by the Bank is equitable* (emphasis added) is in the best interest of the creditors, and (because of the substantial unity of ownership interests in all five debtors in Gould) does not unfairly prejudice the debtors.

Bkrtcy. S.D. Fla., January 29, 1986 (unreported).

On March 20, 1986, the district court entered an order affirming the bankruptcy court's amended Confirmation Order and the order approving substantive consolidation of the debtors' estates. *Holywell Corporation v. Bank of New York*, 59 B.R. 340, 348 (S.D. Fla. 1986), *vacated, Miami*

Center Limited Partnership v. Bank of New York, 838 F.2d 1547, 1558 (11th Cir. 1988). The court's Order granted deference under the "clearly erroneous" standard to the bankruptcy judge's adoption verbatim of the Bank's proposed findings of fact and conclusions of law, 59 B.R. at 344, n. 3, and held, in relevant part:

> The effect of substantive consolidation upon the debtors in this Chapter 11 proceeding is more than merely procedural; it entails the combination of the assets and liabilities of the individual debtors and the elimination of interdebtor claims, *excepting those* ["super-priority"] *loans incurred under the authorization of the Bankruptcy Court.* (Emphasis added) 59 B.R. at 347.
>
> . . . .
>
> In paragraph 66 of the Bankruptcy Judge's Order on Remand (Page 40), it is stated:
>
> > 66. The debtors have claimed prejudice, but have not proven it. . . . The debtors never demonstrated prejudice as an unavoidable consequence of substantive consolidation. . . . 59 B.R. at 348

The district court omitted the remainder of the bankruptcy court's finding of fact that:

> There has been no evidence to substantiate the debtors' claim that substantive consolidation will somehow cost them "approximately $17 million in Federal income taxes." [C.P. No. 580, p. 2]

On March 10, 1988, the court of appeals granted deference to the recused bankruptcy judge's adoption verbatim of the Bank's proposed findings of fact and

conclusions of law, 838 F.2d at 1551, n. 4, and held that the substantial consummation of the Bank's plan precluded judicial relief, in reliance on the bankruptcy court's finding of fact that:

> No stay is in effect, and the confirmed plan has been consummated. The debtor's property passed to the Liquidating Trustee, and the debtors were discharged under Code Section 1141. . . . *Id.* at 1552.

Thereafter, in a separate proceeding concerning the Bank's liability for the payment of the property of HTC and HLC which the trustee conveyed without consideration to the Bank's designee, as the Miami Center's buyer, the district court held:

> . . . by virtue of the substantive consolidation of the Debtors' estates and the establishment of a Liquidating Trust consisting of all assets of the Debtors, title to the stock passed to the Liquidating Trustee. . . . The Liquidating Trustee thereby obtained Holywell's right to acquire the assets of HTC/HLC by either liquidating the two corporations or causing them to distribute a dividend to the Liquidating Trust. . . . [17]

The post-*Holywell* remanded proceedings

After this Court reversed the opinion of the court of appeals that the trustee had not breached his duty under

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[17] S.D. Fla., *HTC and HLC v. Bank of New York*, No. 85-3481-Civ-Kehoe, May 24, 1989 (Unreported), *affirmed*, 11th Cir., January 9, 1991 (Unreported).

the applicable provisions of the Internal Revenue Code,[18] the bankruptcy court held:

> In this case, there is no dispute that the bank failed to include any analysis of the tax consequences of the proposed reorganization scheme in its disclosure statement or *any provision for payment of taxes in its plan* (emphasis added).[19]

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[18] This Court held:

> As the assignee of "all" or "substantially all" of the property of the corporate debtors, the trustee must file the returns that the corporate debtors would have filed had the plan not assigned their property to the trustee, 503 U.S. at 54.

[19] On July 14, 1992, the Internal Revenue Service ("IRS") issued a report ("IRS Holywell Report") that asserted Holywell had taxes due of $19,111,938 for the fiscal year ended July 31, 1986, attributable to the trustee's sale of the Miami Center for the following reasons:

> There are no provisions under the Internal Revenue Code for the consolidation of an individual with a partnership or an individual with a corporation or a partnership with a corporation. These are separate and distinct entities for tax purposes, see section 7701(a) of the Internal Revenue Code.
>
> As a result of the Supreme Court decision and the position of the Solicitor General with respect to the absolute priority of the U.S. *it has been determined that funds were not disbursed by the trustee in accordance with statutory priority and such funds could possibly be recovered and used to pay these* [prepetition] *loans* [$6,291,661].
>
> The trustee misappropriated Holywell's cash [$24,439,216.69] to pay the claims of creditors against MCLP's estate for which Holywell was not liable.
>
> The correct treatment for tax purposes of the trustee's conveyance without consideration of the property of

> *The law requires an analysis of the tax consequences and provision for payment.* See 11 U.S.C. § 1129(d). [citations omitted] The failure to do so is an omission of material fact. . . . As such, *the bank's representations concerning the feasibility of the plan- . . . were materially false* (emphasis added) 161 B.R. at 307.

This Case

On November 23, 1993, after the trustee used the Miami Center Liquidating Trust's funds[20] to pay compromised income tax liabilities asserted against Holywell[21] pursuant to a settlement which relieved Smith of personal liability under 31 U.S.C. § 3713(b), a Fed.R.Civ.P. 60(b)(6) motion was filed, in accordance with Bankruptcy Rule 9024, to vacate the bankruptcy court's order approving substantive consolidation of the debtors' estates.

Holywell's nondebtor subsidiaries was that "the Trustee would have to compensate HTC and HLC for the unpaid rent . . . late charges," and the property's fair market value, in the total amount of $11,932,730.

[20] The Miami Center Liquidating Trust is "a trust of an individual," 503 U.S. at 54, that was "created . . . for the express purpose of liquidating Gould's estate," *Id.* at 56.

[21] See *Bull v. United States*, 295 U.S. 247, 261 (1935) ("the United States . . . cannot, as against the claim of an innocent party, hold his money. . . . [T]he unjust retention is immoral and amounts in law to a fraud on a taxpayer's rights"); also, *Palmer v. Webster & Atlas Nat'l Bank*, 312 U.S. 156, 163-167 (1941) (A trustee administering various estates must keep separate accounts and is precluded from using the assets of one separate taxable entity to pay the taxes of another taxpayer.).

On March 9, 1994, the Fed.R.Civ.P. 60(b)(6) motion was denied on the grounds that:

> 2. . . . The confirmation order specifically provides for substantive consolidation of the Debtors' assets and liabilities. Appeals from both orders were unsuccessful. In its affirmance, the district court held that the two orders were "interdependent and intertwined." App. 11.
>
> The court of appeals dismissed the Debtors' appeal as moot, holding that the plan had been substantially consummated and could not be undone. *Id.*
>
> 3. The motion before the Court appears to be another thinly disguised and untimely motion to vacate the plan. *Id.*
>
> 4. Bankruptcy Code § 1144 permits revocation of a plan only if such request is made within 180 days after the entry of the order of confirmation, and only if confirmation of the plan was procured by fraud.[internal f.n. 1]

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[1] The motion was filed pursuant to F.R.Civ.P. 60(b). That rule is not applicable to a request to revoke a plan. *See* 11 U.S.C. § 9024 [sic]. *Id.*

> 5. Since the motion before the Court was filed more than eight years after entry of the order of confirmation, the motion is denied as untimely. *Id.*
>
> 6. The motion is also denied on grounds of *res judicata*. The Court has already rejected the Debtors' claims of fraud with respect to the plan. *See Smith v. Holywell*, adv. no. 87-0627 slip op. (Bankr. S.D. Fla. September 30, 1993). *Id.*

On June 6, 1997, the district court dismissed as moot the appeal of the bankruptcy court's order denying the Fed.R.Civ.P. 60(b)(6) motion to vacate the order of substantive consolidation. The district court concluded:

> Appellants failed to demonstrate before the bankruptcy court that there was a sufficient basis for granting the extraordinary relief to void transactions carried out by the Trustee under substantive consolidation. App. 6.
>
> . . . .
>
> [T]here is no showing by Appellants of extreme hardship or injustice that should have caused the bankruptcy court to undo the confirmed plan, with its key aspect of substantive consolidation, seven years after approval. . . . *The result of revisiting concluded matters is that the issue on appeal concerning vacating substantive consolidation is moot.* (Emphasis added) *Id.*
>
> Appellants do not overcome the obstacle that the appeal of the confirmation order has been dismissed as moot, *Miami Center Limited Partnership v. Bank of New York*, 838 F.2d 1547, 1557 (11th Cir. 1988) (holding that Court could not fashion any meaningful relief). Confirmation of the plan and granting substantive consolidation of the debtors' estates are intertwined and interdependent. *Id.* at 1550-52. App. 7.

On May 21, 1997, the court of appeals affirmed the district court's dismissal of the appeal of the bankruptcy court's order "for the reasons outlined in the district court's order dated June 6, 1997."

REASONS FOR GRANTING THE WRIT

It is a fundamental rule of Anglo-American jurisprudence that "when the principal thing was not lawful, that which depends upon it was not lawful," Oliver Wendell Holmes, *The Common Law* at 86, and it is uncontroverted that the Bank's plan was not lawful. See *In re Holywell Corp.*, 913 F.2d 873, 880 (11th Cir. 1990) ("if the classification scheme violates basic priority rights, the plan cannot be confirmed.") The Bank's plan was a scheme to avoid income taxes, see 161 B.R. at 307, citing 11 U.S.C. § 1129(d), and the Bank's representations concerning the plan's feasibility were false, *Id.*, for the following reasons:

The Bank took postpetition interest of *$27,050,115* for its "undersecured claim," 54 B.R. at 42, against MCLP's estate as a credit against the Miami Center's purchase price, see *In re Holywell Corp.*, 923 F.2d 865 (11th Cir.), *cert. denied*, 111 S.Ct. 2259 (1991).[22]

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[22] After the trustee negotiated a settlement of Holywell's taxes and the United States agreed to relieve Smith of personal liability upon payment of $10,000,000 from the Miami Center Liquidating Trust's funds, the trustee dismissed his earlier claim that the Bank procured confirmation of its plan through fraud and intentional misrepresentation:

> . . . the bank proposed the plan without such an [tax] analysis and without provision for federal and state taxes, in direct violation of 11 U.S.C. § 1129(d), in order to ensure payment in full of its mortgage lien, together with over $27,000,000 in post-petition interest, and in order to avoid payment of taxes resulting from the implementation of the plan. . . .

Compare *Smith v. Richards*, 38 U.S. (1 Pet.) 26, 36 (1839), quoting Story's *Equity*, §§ 201 and 202 (Intent is not necessary to prove fraud in a court of equity.)

The Bank unilaterally determined the amount of interest payable under the loan documents, without an accounting, which it had earlier agreed to provide. See *In re Holywell Corp.*, 901 F.2d 931, 934 (11th Cir. 1990), *cert. denied*, 111 S.Ct. 713 (1991).[23]

This Court has held that "courts of bankruptcy are essentially courts of equity, and their proceedings inherently proceedings in equity," *Local Loan Co. v. Hunt*, 292 U.S. 230, 240 (1934), and that a bankruptcy court "applies the principles and rules of equity jurisprudence" in exercising the jurisdiction conferred upon it, *Pepper v. Litton*, 308 U.S. 295, 304 (1939).

There is no statutory authority for a bankruptcy court's approval of substantive consolidation, *Eastgroup Properties v. Southern Motels Assoc., Ltd.*, 935 F.2d 245, 248 (11th Cir. 1991). "[S]ubstantive consolidation has no express statutory basis but is a product of judicial gloss," *In re Augie/Restivo Baking Co.*, 860 F.2d 515, 518 (2d Cir. 1988) "[T]he propriety of consolidation must be determined solely in light of the principles and rules of

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[23] The court of appeals held:

> [t]he debtors . . . attempt to tamper with the terms of the sale of the property. This would strike at a crucial element of the reorganization plan. . . . The amount of interest . . . was included in the Bank's bargain for the purchase of the property.

Compare Story, *Equity Proceedings*, Ch. xiv, § 796, 797 and 798 (The conveyance of property to a lender "stands as security only for what is justly due [and] . . . [if] the release may not be a fair transaction . . . ought not to preclude the court from decreeing a new account.")

equity," *F.D.I.C. v. Colonial Realty Co.*, 966 F.2d 57, 60 (2d Cir. 1992).

In *Guaranty Trust Co. v. York*, 326 U.S. 99, 105 (1944), this Court held:

> Equitable relief in a federal court is of course subject to restrictions; the suit must be within the traditional scope of equity as historically evolved in the English Court of Chancery, *Payne v. Hook*, 7 Wall 425, 430; *Atlas Ins. Co. v. Southern, Inc.*, 306 U.S. 563, 568; *Sprague v. Ticonic Bank*, 307 U.S. 161, 164-65; a plain, adequate and complete remedy at law must be wanting, § 16, 1 Stat. 73, 82, 28 U.S.C. § 384; explicit Congressional curtailment of equity powers must be respected, see, e.g. Norris-LaGuardia Act, 47 Stat.70, 29 U.S.C. § 101 *et seq.*. . . .

"Equity will not lend [itself] to . . . fraud and historically has relieved from it," *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1945).

1. Fraud Voids Any Transaction

It is a rule of law that the grounds for the failure of a contract as void are mistake, misrepresentation, or fraud, and that a contract is voidable at the election of the damaged party. This Court has held that "[f]raud will vitiate any, even the most solemn, transactions; and an asserted title to property founded upon it, is utterly void," *United States v. The Libellants and Claimants of The Schooner Amistad*, 40 U.S. 518, 594 (1841), and Story, *Treatise on Equity Jurisprudence*, vol. 1, Ch. vii, states:

> Whether a conveyance be fraudulent, or not, is declared to depend upon its being made upon

> "good consideration and bona fide." It is not sufficient, that it be upon good consideration, or *bona fide*. It must be both.

Furthermore, "the principle upon which courts of equity have proceeded . . . [is] that a person who has gotten the estate of another, ought not, in conscience as between them, to be allowed to keep it, and not to pay the full consideration money,"[24] and a lender who purchases real estate, subject to his debt, with knowledge of superior liens, is liable for the payment of the unpaid debt. *Id.* See, *Northern Pacific Railway v. Boyd*, 228 U.S. 482, 504 (1912);[25] also, *Protective Committee v. Anderson*, 390 U.S. 414, 441 (1968).[26] Thus, Chopin's ground rent of $5,300,000 could not be eliminated under substantive consolidation.

It is also settled that, although a court of equity will administer relief through the consolidation of the funds of different estates, the marshalling of assets is subject to the condition that "the parties seeking aid are creditors of the same common debtor, for, if they are not, they are not entitled to have the funds marshalled," Story's *Commentaries*, § 642. Thus, taxes due on the income attributable to

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[24] Story, *Treatise on Equity Jurisprudence*, § 1219.

[25] This Court held:

> . . . if purposefully . . . a single creditor was not paid, or provided for in reorganization, he could assert his superior rights against the subordinate interests in the property transferred.

[26] This Court held:

> . . . the absolute priority doctrine . . . [provides] participation by junior interests depends upon the claims of senior interests being fully satisfied.

Holywell's property must be paid from Holywell's funds. See 503 U.S. at 52.

Holywell's Rule 60(b)(6) motion to vacate the bankruptcy court's substantive consolidation order sought equitable relief from the fraudulent conveyance of the property of HTC and HLC, 8 *supra*, from the elimination of Chopin's claim for ground rent which had a priority superior to the Bank's liens, and from the misappropriation of Holywell's cash to pay the claims of creditors against MCLP's estate for which Holywell was not liable, 16 *supra*.

The failure to vacate substantive consolidation means that the IRS erroneously assessed and collected taxes attributable to the trustee's sale of the Miami Center on October 10, 1985, and thereafter, for which Holywell was not liable under the applicable provisions of the Internal Revenue Code. See 26 U.S.C. § 336 (prior to August 1, 1986) (no gain or loss was recognized to a liquidating corporation on distribution of property in complete liquidation); also, *General Utilities and Operating Co. v. Helvering*, 296 U.S. 200, 204 (1935) ("the declaration and payment of the dividend resulted in no taxable income" to the liquidating corporation); 26 U.S.C. § 361(c) (prior to August 1, 1986) (no gain or loss recognized by corporation, if as a party to a liquidating plan, it dividended its property and cash to its shareholder pursuant to such plan.) In this case, Holywell's capital stock was transferred to the Miami Center Liquidating Trust, and Holywell's property and cash was dividended to the trustee as Gould's fiduciary, 503 U.S. at 55.

2. The Miami Center Mootness Ruling Does Not Preclude Equitable Relief Under Fed.R.Civ.P. 60(b)(6)

This Court has recognized that a judgment may be reexamined years after it has been entered "whenever such action is appropriate to accomplish justice." *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864 (1988) (quoting *Klapprott v. United States*, 335 U.S. 601, 614-615 (1949)).

It is uncontroverted that the *Miami Center* mootness doctrine is not based on the Article III requirement that the federal courts decide only "Cases" and "Controversies." See *DeFunis v. Odegaard*, 416 U.S. 312 (1974); *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). The "usual rule in federal cases . . . that an actual controversy must exist at stages of appellate or certiorari review," *Roe v. Wade*, 410 U.S. 113, 125 (1973) is fully met here. The framers extended the judicial power of the federal courts to cases in equity that "involve those ingredients of fraud . . . [and] trust . . . which would render the matter an object of equitable, rather than legal jurisdiction," Hamilton, *The Federalist Papers*, No. 80.

It is also uncontroverted that the *Miami Center* mootness doctrine is not based on statutory authority. See 838 F.2d at 1553 ("Section 363(m) does not apply where the debtor's assets have been sold, as here, by a liquidating trustee pursuant to a plan of liquidation.") The Bankruptcy Code has only two provisions precluding appellate review in the absence of a stay: sections 363(m) and 364(e). Neither is applicable to the trustee's transactions. The trustee of the Miami Center Liquidating Trust is not

"a fiduciary of a bankruptcy estate," 503 U.S. at 55, and both provisions of the Bankruptcy Code apply only to a preconfirmation sale of the bankruptcy estate's property.

The opinions of the lower courts which are the subject of this petition are based on misconstruing this Court's precedent concerning the doctrine of *res judicata*.

The doctrine of *res judicata* that "[p]ublic policy dictates that there be an end of litigation; that those who have contested an issue should be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties," *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 309, 401 (1980), is not applicable in this case.

In this case, substantive consolidation was approved and the Bank's plan was erroneously confirmed based on fraud. Thus, the proper standard requires consideration of equitable relief and

> [j]ust as *res judicata* is occasionally qualified by an overriding, competing principle of public policy, so occasionally it needs an equitable tempering. 1B J. Moore & T. Currier, Moore's Federal Practice, par. 0.405[12], p. 791 (1980) (footnote omitted). See also *Reed v. Allen*, 286 U.S. 191, 209, 52 S.Ct. 532, 537, 76 L.Ed. 1054 (1932) (Cardozo, J., joined by Brandeis and Stone, JJ., dissenting) ("A system of procedure is perverted from its proper function when it multiplies impediments to justice without the warrant of clear necessity.") 452 U.S. at 403.

Unlike *Federated*, this case requires that the doctrine of *res judicata* give way to equity, because the Bank's plan did not provide for the payment of income taxes, 503 U.S. at

51, a trust was created for the purpose of avoiding income taxes, 5, n. 5, *supra*, and the substantive consolidation provision of the Bank's plan did not conform to the absolute priority rule, resulted in the conveyance of property without consideration, and violated the rules of equity jurisprudence concerning fraud. See 22 *supra*, quoting Story's *Treatise*.

This Court has held that all federal courts possess an inherent power that, *inter alia*:

> allows a federal court to vacate its own judgment upon proof that a fraud has been perpetrated upon the court. This "historic power of equity to set aside fraudulently begotten judgments," *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 245 (1944), is necessary to the integrity of the courts, for "tampering with the administration of justice in [this] manner . . . involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public. *Id.* at 246.

Chambers v. NASCO, Inc., 111 S.Ct. 2123, 2132 (1991). While Congress has determined that a Court may not "revoke" an order of confirmation for fraud after 180 days have elapsed, 11 U.S.C. § 1144, the bankruptcy court's inherent power provides substantial alternatives to revocation, including the relief requested here – liability of the Bank as the plan's proponent for the damages caused by its fraud.

In *Butler v. Eaton*, 141 U.S. 240, 243 (1891), this Court held:

> It is apparent from the inspection of the record that the whole foundation of that part of the judgment which is in favor of the defendant is, to our judicial knowledge, without any validity, force or effect, and ought never to have existed. Why then, should not we reverse the judgment which we know of record has become erroneous.

Similarly, in *Mills v. Green*, 159 U.S. 651, 654 (1895), this Court held:

> [A] court . . . is not deprived of the authority, whenever in its opinion justice requires it, to deal with the rights of the parties as they stood at the commencement of the suit, and to compel the defendant to undo what he has wrongfully done since that time, or to answer in damages.

Similarly, in *Ohio v. Madeline Marie Nursing Home*, 694 F.2d 449, 463 (6th Cir. 1982), the Sixth Circuit held that the mootness doctrine was inapplicable where disgorgement is available. Fed.R.Civ.P. 60(b)(6) does not require proof of fraud:

> Subsection (6) . . . is itself clearly for equitable relief and . . . [w]e think that it was meant to provide for situations of extreme hardship, not only those, if there be any, that subsections (1), (2), and (3) do not cover, *but those that they do.* (Emphasis added) In short – to put it quite baldly – we read the subsection as giving the court a discretionary power from the limitation imposed by the Rule itself on subsections (1), (2), and (3). . . .

United States v. Karahalis, 205 F.2d 331, 333 (2d Cir. 1943).

It is uncontroverted that the Bank granted the trustee an indemnity as an inducement to commence distribution and cause the plan's substantial consummation, App. 8, and the trustee filed a motion to dismiss the appeal of the bankruptcy court's order confirming the Bank's plan in order to deprive an appellate court of authority to grant judicial relief from the unlawful provisions of the Bank's plan. See 838 F.2d at 1550, n. 3.

This Court should not countenance the manifest injustice caused by considerations of finality and settled matters, for which there is no constitutional or statutory authority, and also injustices based on the Bank's fraud and the trustee's failure to seek the proper court's instructions, or an IRS ruling, concerning the plan's tax consequences, prior to commencement of distribution under the plan's provisions, in reliance on the Bank's indemnity. See *Glasgow v. Lipse*, 117 U.S. 327, 333-334 (1885) ("when doubting, seek the authority and direction of the proper court"); also, *Mosser v. Darrow*, 341 U.S. 267, 274 (1951) ("The practice is well established by which trustees seek instructions from the court.")

CONCLUSION

This petition for writ of certiorari should be granted.

Respectfully submitted,

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United States Court of Appeals
For the Eleventh Circuit

No. 97-5225

District Court Nos. 94-788-cv-LCN

IN RE: HOLYWELL CORPORATION, MIAMI CENTER LTD. PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES, and THEODORE B. GOULD,

Debtors,

HOLYWELL CORPORATION, THEODORE B. GOULD,

Plaintiffs-Appellants,

versus

FRED STANTON SMITH, BANK OF NEW YORK,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

Before COX, and HULL, Circuit Judges, and COHILL*, Senior District Judge.

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*Honorable Maurice B. Cohill, Jr., Senior U.S. District Judge for the Western District of Pennsylvania, sitting by designation.

JUDGMENT

(Filed May 21, 1999)

This cause came to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the order of the said District Court appealed from in this cause be and the same is hereby AFFIRMED;

IT IS FURTHER ORDERED THAT each party bear its own costs on appeal.

Entered: May 21, 1999
For the Court: Thomas K. Kahn, Clerk
By: /s/ Matt Davidson
Deputy Clerk

ISSUE AS MANDATE: JUL. 30, 1999

Case No. 94-0788-CIV-NESBITT
BKC Nos. 84-01590 through
84-01594-BKC-PGH

IN RE:

HOLYWELL CORPORATION, et al.,

Debtors.

_____/

HOLYWELL CORPORATION and
THEODORE B. GOULD,

Appellants,

vs. (Filed June 6, 1997)

FRED STANTON SMITH, Trustee,
and BANK OF NEW YORK,

Appellees.

_____/

ORDER DISMISSING APPEAL OF BANKRUPTCY COURT'S ORDER DENYING MOTION TO VACATE ORDER OF SUBSTANTIVE CONSOLIDATION

THIS CAUSE came before the Court upon the appeal of the Order entered by the bankruptcy court on March 9, 1994, denying the debtors' Motion under Fed.R.Civ.P. 60(b) to vacate the Order Approving Substantive Consolidation. The consolidation of the estates of the five debtor entities was proposed in the Bank of New York's plan of reorganization. Holywell Corporation and Theodore B. Gould challenge the actions taken by Fred Stanton Smith,

Liquidating Trustee, with respect to carrying out the confirmed plan of reorganization through substantive consolidation of the estates. The Trustee and the Bank of New York oppose Holywell and Gould in this Cause.

The issues raised by Appellants pertain to the denial of the motion under Fed.R.Civ.P. 60(b)(6) [Bankr. Rule 9024], seeking relief from the Order Approving Substantive Consolidation, and the alleged failure of the bankruptcy court to enforce the Bank of New York's indemnification of the Trustee for damages to the Miami Center Liquidating Trust. Appellants' theory is that the bank is liable for the losses suffered by the debtors and their estates through the administration of the Trust by the Liquidating Trustee, based on substantive consolidation. The damages are alleged by Appellants to be $223,266,587.00.

FACTUAL BACKGROUND

The debtors are Holywell Corporation, Miami Center Limited Partnership, Miami Center Corporation, Chopin Associates, and Theodore B. Gould. The Order Approving Substantive Consolidation was entered by the bankruptcy court on July 23, 1985. The estates of the debtors were consolidated into a single estate, with assets to be assigned to the Miami Center Liquidating Trust for the purpose of liquidating the assets of the debtor entities to pay the claims of their creditors under the terms of the plan. The bankruptcy court confirmed the bank's proposed plan on August 8, 1985. The debtors' Rule 60(b)(6) Motion was filed on November 19, 1993.

DISCUSSION

1. Motion to Vacate Order Approving Substantive Consolidation

The debtors' motion under Rule 60(b) was filed seven years after the confirmation of the bank's plan, of which substantive consolidation of the debtors' estates was a primary provision. Based on Appellants' assertion of the bank's fraud and the Trustee's breach of fiduciary duty, Gould and Holywell rely on Rule 60(b) to seek equitable relief to vacate the prior approval of substantive consolidation.

Bankr. Rule 9024(3)[1] limits a Rule 60(b) motion to the time set forth in 11 U.S.C. § 1144 to revoke a confirmation Order, which this motion can be equated to because of the primacy of the substantive consolidation provision for the operation of the plan. Under Section 1144, the time limit is set at 180 days after the confirmation Order, unless the Order was procured by fraud.

The bankruptcy court held that the issue of fraud is precluded by *res judicata*. This Court agrees that the issue of fraud cannot be reargued as a basis for the Rule 60(b) motion.

Appellants contend that the relief was sought within a "reasonable time". Appellants justify the time of filing the Rule 60(b) motion as not caused by inexcusable

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[1] Bankr. Rule 9024(3) provides, in relevant part, that:

"Rule 60 F.R.Civ. P. applies in cases under the Code except that . . . a complaint to revoke an order confirming a plan may be filed only within the time allowed by § 1144. . . . "

neglect or deliberate choice not to seek an appeal. The debtors failed to post a 90-day $50 million supersedeas bond to stay the confirmation Order, and the Trustee commenced distribution to creditors. The fact that the judgment pertains to a large sum of money is asserted by Appellants to argue that the equivalent of a default judgment should not preclude review of the substantive consolidation issue.

Appellants have proceeded under Rule 60(b) as a repetition of theories which were previously presented to, and rejected by, the bankruptcy court. Gould and Holywell reargue their objections to the transactions engaged in by the Trustee that took place throughout the many years since the confirmation of the plan in 1985. Appellants failed to demonstrate before the bankruptcy court that there was a sufficient basis for granting the extraordinary relief to void transactions carried out by the Trustee under substantive consolidation.

Appellants assert that the bankruptcy court's denial of the motion was an abuse of discretion. However, there is no showing by Appellants of extreme hardship or injustice that should have caused the bankruptcy court to undo the confirmed plan, with its key aspect of substantive consolidation, seven years after its approval. Appellants' reargument of previously adjudicated matters seeks to unravel the central core of the plan. The result of revisiting concluded matters is that the issue on appeal concerning vacating substantive consolidation is moot.

To oppose Appellees' assertion of mootness, Appellants argue that the plan still controls the actions of the Trustee, and that the ongoing effect of these actions

relates to the re-emergence of the debtors as revitalized entities. However, Appellants do not overcome the obstacle that the appeal of the confirmation Order has been dismissed as moot. *Miami Center Limited Partnership v. Bank of New York*, 838 F.2d 1547, 1557 (11th Cir. 1988) (holding that Court could not fashion any meaningful relief). Confirmation of the plan and granting substantive consolidation of the debtors' estates are intertwined and interdependent. *Id.* at 1550-52.

The Court finds Appellants' position to be without merit to overcome the mootness of the issue on appeal, which goes to the heart of the Chapter 11 plan. *See Holywell Corp. v. Bank of New York*, No. 95-5351 (11th Cir. Apr. 30, 1997) (circumstances surrounding implementation of the plan have not changed since the earlier decision on mootness).

2. Enforcement of Indemnity Agreement

After the effective date of the plan, October 10, 1985, the Trustee proceeded with the distribution to creditors, subject to the bank agreeing to hold the Trustee personally harmless for his actions taken under the plan's provisions. Gould relies on his status as the residual beneficiary of the Trust to seek enforcement of the bank's October 10, 1985 agreement with the Trustee.

Appellants seek the remedy of damages under the indemnification agreement for the alleged misconduct of the Trustee against the interests of the beneficiary. Gould asserts this request as a non-party to the agreement, which under other circumstances he has claimed is part

of a collusive scheme of indemnification adverse to the interests of the Trust and the beneficiary.

The assertion of beneficiary status by Gould cannot overcome the primary purpose of the trust, which is to pay the claims of creditors through administration of the consolidated estate by the Trustee. The Trustee was induced by the indemnity agreement to proceed with terms of the plan providing for the sale of the debtors' Miami Center property. *See Smith v. Bank of New York,* 161 B.R. 302, 307 (Bankr.S.D.Fla. 1993). Decisions pertaining to the administration of the Trust are outside the scope of being directed by the debtors, and the Trustee is the proper party to seek enforcement of the indemnity agreement. *Id.*

CONCLUSION

The Court finds that: (1) the issue seeking to vacate the bankruptcy court's approval of substantive consolidation is moot, as subsumed by the confirmation of the bank's plan, because meaningful relief may not be granted to Appellants; and (2) the debtors lack standing as non-parties to the indemnity agreement to seek enforcement of the agreement by the Bank of New York to hold the Liquidating Trustee harmless. Accordingly, it is

ORDERED and ADJUDGED that this appeal on the issue of Vacating the Order of Substantive Consolidation is dismissed on the ground of mootness; it is further **ORDERED** that the issue of enforcing the indemnity agreement by the Bank of New York to the Trustee is dismissed on the ground that Appellants lack standing to

seek relief as non-parties to the indemnity agreement; and, therefore, based upon the foregoing considerations, this appeal is **DISMISSED.**

DONE AND ORDERED in Chambers at Miami, Florida, this 6 day of June, 1997.

/s/ Lenore C. Nesbitt
LENORE C. NESBITT
UNITED STATES
DISTRICT JUDGE

copies provided:

The Hon. Paul G. Hyman
Clerk, U.S. Bankruptcy Ct.
Herbert Stettin, Esq.
Theodore B. Gould, pro se
Vance E. Salter, Esq.
Fred Stanton Smith, Trustee
Robert A. Musselman, Esq.

IN THE UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NOS.: 84-01590-BKC-PGH
84-01591-BKC-PGH
84-01592-BKC-PGH
84-01593-BKC-PGH
84-01594-BKC-PGH

CHAPTER 11

In re:

HOLYWELL CORPORATION, MIAMI CENTER LTD. PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES, and THEODORE B. GOULD,

Debtors.
_____/

ORDER ON MOTION TO VACATE ORDER OF SUBSTANTIVE CONSOLIDATION

(Filed March 9, 1994)

THIS MATTER came before the Court on January 19, 1994 on the Debtors' motion to vacate the order of substantive consolidation pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, and the Court having considered the motion, the evidence presented and argument of the parties, and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED:

1. The Debtors filed a motion on November 19, 1993 to vacate the July 25, 1985 order of substantive consolidation, pursuant to Rule 60(b) of the Federal Rules of Civil Procedure.

2. The plan of reorganization in this case was confirmed on August 8, 1985, just two weeks after the order of substantive consolidation. The confirmation order specifically provides for substantive consolidation of the Debtors' assets and liabilities. Appeals from both orders were unsuccessful. In its affirmance, the district court held that the two orders were "interdependent and intertwined." The court of appeals dismissed the Debtors' appeal as moot, holding that the plan had been substantially consummated and could not be undone.

3. The motion before the Court appears to be another thinly disguised and untimely motion to vacate the plan.

4. Bankruptcy Code § 1144 permits revocation of a plan only if such request is made within 180 days after the entry of the order of confirmation, and only if confirmation of the plan was procured by fraud.[1]

5. Since the motion before the Court was filed more than eight years after entry of the order of confirmation, the motion is denied as untimely.

6. The motion is also denied on grounds of *res judicata*. The Court has already rejected the Debtors' claims of fraud with respect to the plan. *See Smith v. Holywell*, adv. no. 87-0627 slip op. (Bankr. S.D. Fla. September 30, 1993). Findings of Fact and Conclusions of Law on the Debtors' Counterclaims Against the Trustee and Cross-Claims Against the Bank.

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[1] The motion was filed pursuant to F.R.Civ.P. 60(b). That rule is not applicable to a request to revoke a plan. *See* 11 U.S.C. § 9024.

7. It is, therefore, ORDERED AND ADJUDGED that the Debtors' motion to vacate the order of substantive consolidation is denied.

DONE and ORDERED in Chambers, Miami, Dade County, Florida, this 9 day of March, 1994

/s/ Paul Hyman
PAUL G. HYMAN
UNITED STATES
BANKRUPTCY JUDGE

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Supreme Court, U.S.
FILED
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No. 99-301

In The

Supreme Court of the United States

HOLYWELL CORPORATION,

Petitioner,

vs.

THE BANK OF NEW YORK and
FRED STANTON SMITH, as Trustee of the
MIAMI CENTER LIQUIDATING TRUST,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit**

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals, district court, and bankruptcy court correctly exercised their discretion in denying the Petitioner's motion to vacate, on the basis of Fed. R. Civ. P. 60(b), a bankruptcy court order entered over seven years ago?

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STATEMENT OF JURISDICTION

The Petitioner asserts that jurisdiction exists under 28 U.S.C. § 1254(1). No jurisdiction exists, however, as the Petitioner has failed to claim or prove the existence of any constitutional issue, important and unsettled question of federal law, or conflict among the circuit courts of appeal. Sup. Ct. R. 10.1(a) through (c); *Braxton v. United States*, 500 U.S. 344, 347-48 (1991).

STATEMENT OF THE CASE

Introduction

This case is the fifteenth attempt by the debtors in the consolidated bankruptcy proceeding – commenced voluntarily by the debtors in 1984 – to delay and disrupt the closing of the cases.[1]

The debtors have commenced and prosecuted, unsuccessfully in each instance, over 30 appeals to the court of appeals, and over 80 appeals in the district court, in the

[1] Of the 15 petitions to this Court, 14 were denied. The petition in 90-1361 was consolidated with a petition for *certiorari* filed by the Solicitor General (90-1484), and was granted. The Solicitor General's petition involved complex issues regarding federal income tax and bankruptcy law. The Solicitor General prevailed; *Holywell Corp. v. Smith*, 503 U.S. 47 (1992). After remand, the bankruptcy trustee settled the resulting tax liability with the Internal Revenue Service and the settlement was approved by the bankruptcy court. The bankruptcy cases were finally closed in September, 1998.

ten years since a creditors' plan of reorganization was confirmed.

For their serial, collateral attacks, the debtor/Petitioner and its counsel here have been sanctioned on several occasions. For example, after a series of losses in the bankruptcy court, the Petitioner and its counsel tried to circumvent the Florida bankruptcy court by filing lawsuits against Respondents in Virginia and in the state court in Florida, for which the bankruptcy court in Florida then imposed some $138,000 in sanctions against the Petitioner, principal of the Petitioner and their counsel.[2]

The present Petition is also frivolous.[3]

The Rule 60(b) Attacks

In 1994, the debtor/Petitioner filed a motion under Federal Rule of Bankruptcy Procedure, Rule 9024 (which adopts Federal Rule of Civil Procedure, Rule 60(b)), asking the bankruptcy court to vacate the August 8, 1985 order substantively consolidating the debtors' estates.

The motion sought to unravel the substantive consolidation feature of the Plan of Reorganization over seven years after substantial consummation of the Plan. It also sought an order compelling the Respondent Trustee, "to enforce the Bank of New York's indemnification for $189,372,757", despite the bankruptcy court's prior ruling

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[2] *In re Holywell Corp.*, 967 F.2d 568 (11th Cir. 1992).

[3] The debtor/Petitioner and its counsel have been held in contempt and sanctioned repeatedly for attempting to relitigate previously decided issues, and for attempts to circumvent bankruptcy court rulings.

that the Petitioner and its principal (Theodore B. Gould) had no claims against the Trustee or the Bank.[4] The motion sought "equitable relief" and a mandatory injunction to compel the Trustee to take certain actions, but it was not filed as an adversary proceeding as required.[5]

Gould, the principal of the Petitioner and himself a co-debtor, argued the Motion on January 19, 1994, although he is not an attorney. Gould never detailed specific reasons for relief under Bankruptcy Rule 9024 or Fed. R. Civ. P. 60(b)(5) or (6), and neither his argument nor this Petition mentioned the portion of the motion seeking an order to compel the Trustee to recover Gould's claims for over $189 million.

The motion was denied by the bankruptcy court, which found the motion, "to be another thinly disguised and untimely motion to vacate the plan." (Petitioner's App. 10). The district court affirmed (Petitioner's App. 3), as did the court of appeals (Petitioner's App. 1).

This Petition followed.

SUMMARY OF ARGUMENT

The bankruptcy court, district court, and court of appeals correctly determined that the motion was procedurally defective. The "Rule 60(b)" part of the motion,

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[4] The Petitioner subsequently increased the demanded sum to $223,266,587.00 (Petitioner's App. 4).

[5] Federal Rule of Bankruptcy Procedure, Rule 7001(7). 9 *Collier on Bankruptcy* ¶ 7001.10 at 7001-24 (15th ed. 1994).

which is the only part subject to this Petition,[6] was untimely, failed to state any appropriate basis for relief, and was barred by previous rulings in these cases. The bankruptcy court did not abuse its discretion in denying the motion, and the district court and court of appeals correctly affirmed. Accordingly, the Petition should be denied.

ARGUMENT

I. INTRODUCTION

The Petition consists of 30 pages of recrimination against 10 years of prior rulings in these cases. The 1984 cash collateral order (Petition at p. 5), the 1985 confirmation order as modified on remand in 1986 (*id.* at p. 13), and numerous other rulings are rehashed as if they provided some basis to re-open a material term of the confirmed Plan. They do not.

II. THE LOWER COURTS DID NOT ABUSE THEIR DISCRETION

The standard for the review of a judicial determination applying Rule 60(b) is the "abuse of discretion" standard. 11 Wright and Miller, Fed. Practice and Pro.: Civil § 2857 (1995). This Court does not exist to review for a third time the bankruptcy court's exercise of discretion

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[6] The "motion to enforce" was not brought as an adversary proceeding, was barred by prior rulings, and was essentially abandoned by the appellants below, and by the Petitioner here.

already reviewed twice by the district court and court of appeals.

A. The Rule 9024 Motion Was Untimely.

Bankruptcy Rule 9024 provides:

> Rule 60 F.R. Civ. P. applies in cases under the Code except that (1) a motion to reopen a case under the Code or for the reconsideration of an order allowing or disallowing a claim against the estate entered without a contest is not subject to the one year limitation prescribed in Rule 60(b), (2) a complaint to revoke a discharge in a chapter 7 liquidation case may be filed only within the time allowed by § 727(e) of the Code, and (3) a complaint to revoke an order confirming a plan may be filed only within the time allowed by § 1144, § 1230, or § 1130.

A motion under this Rule seeking revocation of an order of confirmation – the purpose and effect of the motion, since substantive consolidation was a principal element of the Plan – must be brought "before 180 days after the date of the order of confirmation"; after that time, revocation requires proof that the order, "was procured by fraud". 11 U.S.C. § 1144. In this case, the motion was filed over seven years after the confirmation order, and no evidence of fraud was offered or found.[7]

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[7] The Petitioner appears to confuse a judgment procured by fraud with the constructive fraud theory of fraudulent conveyance. The Petitioner argues that the substantive consolidation ruling was incorrect, and that as a result of the erroneous judgment the Respondents received property to

The lower courts thus held, as one alternative basis for their decisions, that the Petitioner's motion was untimely (Petitioner's App. 2, 5-6, 11). This Court's tax opinion was rendered on February 25, 1992, but the Petitioner did not file its motion until April, 1993. The Petitioner has not shown that this determination by the district court was an abuse of discretion.

B. The Grounds Raised by the Petitioner Are Barred by the Res Judicata and Mootness Doctrines.

The lower courts found that the grounds asserted by the Petitioner were barred by the doctrine of res judicata insofar as they have been raised, and rejected, numerous times before. (Petitioner's App. 2, 5-6, 11). They also found the grounds barred by the mootness doctrine. (*Id.* at 2, 6-7, 11). The Petitioner apparently concedes these points, but asserts that the doctrines are inapplicable to the Petitioner on grounds of "equity". The Petitioner does not, however, explain why it was an abuse of discretion for the lower courts to apply the doctrines.

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which they were not entitled, the receipt of which the Petition terms a "fraudulent conveyance". (Petition at 20-24). It is this "fraud" theory that the Petitioner argues justifies relitigation. Such a "fraud" theory would apply to every judgment argued to be incorrect and render meaningless the requirements of Federal Rule of Bankruptcy Procedure, Rule 9024 (adopting Federal Rule of Civil Procedure, Rule 60(b).)

It is just this sort of endless reargument of previously-decided issues that has caused the Petitioner and its counsel to be sanctioned under Bankruptcy Rule 9011.[8]

Rule 60(b)(6), relied upon by the Petitioner, is a "catchall" provision for "any other reason justifying relief". This subsection is reserved for cases involving "extreme hardship or injustice"[9] and "extraordinary cases".[10] Holywell received a discharge under 11 U.S.C. § 1141(d) as a result of the confirmation of the Bank's Plan. It was thereby given a "fresh start" and relieved of over $300 million in debts.

In view of the broad discretion afforded trial courts under Bankruptcy Rule 9024 and Fed. R. Civ. P. 60(b),[11] it is clear that the bankruptcy court did not err in denying the motion.

---

[8] Over $24,000 in sanctions was imposed on the Petitioner, its principal, Gould, and their attorney Musselman for frivolous re-argument. They have all also been held in contempt for the same reason.

[9] *Transit Cas. Co. v. Security Trust Co.*, 441 F.2d 788, 792 (5th Cir. 1971).

[10] *Ackerman v. United States*, 340 U.S. 193, 200, 71 S.Ct. 209, 212, 95 L.Ed. 207, 212 (1950).

[11] Wright & Miller notes, at § 2872, that the trial court is "given a very large measure of discretion in passing on those motions", and that "the appellate courts pay considerable deference to that discretion". *Id.* at 261 (1994).

CONCLUSION

None of the appropriate grounds for *certiorari* are present. The three lower courts ruled correctly and unanimously. Their respective decisions were well within their discretion. For all these reasons, it is respectfully submitted that the writ should be denied.

Respectfully submitted,

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In The

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HOLYWELL CORPORATION,

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v.

BANK OF NEW YORK and
FRED STANTON SMITH, as Trustee of the
Miami Center Liquidating Trust,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

1. *This Court Has Jurisdiction To Review.* – The brief in opposition[1] of the respondents, Bank of New York ("Bank") and Fred Stanton Smith, as trustee of the Miami Center Liquidating Trust, is based on the clearly erroneous legal contention that "[n]o jurisdiction exists . . . as the Petitioner has failed to claim or prove the existence of any constitutional issue, important and unsettled question of federal law, or conflict among the circuits," Bank at 1. Thus, the respondents argue that under the doctrine of res judicata and the Miami Center mootness ruling, *Miami Center Limited Partnership v. Bank of New York*, 838 F.2d 1547 (11th Cir.), *cert. denied*, 488 U.S. 823 (1988), this Court lacks authority to grant equitable relief under Fed.R.Civ.P. 60(b)(6) to accomplish justice and vaeate a judgment procured by fraud. We disagree. See, *Brown v. Felsen*, 442 U.S. 127, 132 (1979) (res judicata does not preclude evidence of fraud to vacate a judgment); also *Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948) (a final judgment "puts an end to the cause of action . . . absent fraud or some other factor invalidating the judgment.")

Jurisdiction is granted to this Court under 28 U.S.C. § 1254, *Courts of appeals; certiorari; etc.*, which provides, in relevant part:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

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[1] Respondents' Brief In Opposition is cited herein as "Bank at ___."

> (1) By writ of certiorari granted upon the petition of any party to any civil . . . case, before or after rendition of judgment or decree.

Although this Court's review on the merits of certiorari "is not a matter of right, but of judicial discretion," Sup. Ct. R. 10, *Considerations Governing Review on Writ of Certiorari*, the reasons to be considered include, in part:

> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; . . . or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> . . .
>
> (c) When . . . a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

The failure to vacate the bankruptcy court's approval of the substantive consolidation provision of the Bank's plan was clearly an abuse of discretion of the courts below "to exercise a sound, legal discretion, that is, a discretion 'guided by accepted legal principles',"[2] for the following reasons:

---

[2] *United States v. Gould*, 301 F.2d 353, 355 (5th Cir. 1962), citing 7 Moore's *Federal Practice*, p. 223, *et seq.*; also, *Tozer v. Chas. A. Krause Milling Co.*, 189 F.2d 242 (3d Cir. 1951); and *Klapprott v. United States*, 335 U.S. 601 (1949).

(1) The decision of the court of appeals is in conflict with this Court's opinion, *Holywell Corporation v. Smith*, 503 U.S. 47, 112 S.Ct. 1021 (1992), sanctions fraud, and is a departure by the lower courts from the accepted course of judicial proceedings for hearings in conformity with this Court's opinion. See *Sanford Fork & Tool Co.*, 160 U.S. 247 (1895).[3]

(2) Whether the doctrine of finality applicable in bankruptcy proceedings based on the Miami Center mootness ruling, for which there is no specific constitutional or statutory authority, precludes equitable relief and justice from a bankruptcy court's order confirming a plan which was procured by fraud, is an important question which should be settled by this Court.[4]

2. *This Court's Holywell Opinion Requires Vacating The Substantive Consolidation Provision Of The Bank's Plan.*

(a) The Solicitor General's argument in the proceedings before this Court does not help the respondents to

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[3] This Court's *Holywell* opinion is the "law-of-the-case" and the lower courts "cannot vary it, or examine it for any other purpose than execution; or to give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal." 160 U.S. at 255.

[4] No other United States court of appeals has held that a bankruptcy court had the power to confirm a plan of liquidation, which did not provide adequate means for the payment of taxes due on the income attributable to the sale of property under the provisions of a plan based on the application of the doctrine of substantive consolidation to fraudulently convey property *without* consideration or to eliminate the valid claims of insiders with a superior priority to part or all of the liens of the plan's proponent.

argue that equitable relief should not be granted under Fed.R.Civ.P. 60(b)(6) to vacate the substantive consolidation provision of the Bank's plan in order to accomplish justice. The Solicitor General argued:

> The collateral consequence that occurs if the trustee is deemed to be an assignee is somewhat significant. . . . The United States would have an absolute priority for the payment of taxes under the absolute priority statute, instead of a bankruptcy priority under [§] 507 of the [Bankruptcy] Code and under the [Bank's] plan, and the trustee would also be personally liable for taxes under [31 U.S.C. §] 3713(b).[5]
>
> We differ with the debtors on this only in that we think it is clear under cases like *In re San Juan Hotel* from the First Circuit . . . that a trustee has a fiduciary duty under title 11 to pay taxes and can be personally liable if he fails to do so.

S.Ct., *Transcript*, December 4, 1991, at 15. This Court agreed with the Solicitor General and the Petitioner that the trustee was an "assignee of 'all' or 'substantially all' of the property of the corporate debtors," 503 U.S. at 54.[6]

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[5] Section 3713(b) of Title 31, United States Code, Money and Finance, provides in part:

> (b) A representative of a person or an estate (except a trustee acting under title 11) paying any part of a debt of the person or estate before paying a claim of the Government is liable to the extent of the payment for unpaid claims of the Government.

[6] The manner in which 31 U.S.C. § 3713 operates has been well described in a case decided over a century and a half ago, when the statute (apart from the exception for the Bankruptcy Code) had the same structure as it now has:

(b) This Court did specifically reject the Solicitor General's argument that "the bankruptcy plan substituted the trustee for Gould but did not alter the bankruptcy estate," 503 U.S. at 55.[7] Thus, the trustee is not "a

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> From the language employed in this section, and the construction given to it, from time to time, by this Court, these rules are clearly established: first, that no lien is created by the statute: secondly, the priority established can never attach while the debtor continues the owner and in the possession of the property, although he may be unable to pay all his debts: thirdly, no evidence can be received of the insolvency of the debtor, until he has been divested of his property in one of the modes stated in the section: and fourthly, whenever he is thus divested of his property, the person who becomes invested with the title, is thereby made a trustee for the United States, and is bound to pay their debt first out of the proceeds of the debtor's property.

Beaston v. Farmer's Bank, 37 U.S. (12 Pet.) 102, 133-34 (1838); also, *Thelusson v. Smith*, 2 Wheat 396, 426 (1817); *Conard v. Atlantic Ins. Co. of N.Y.*, 1 Pet. 386, 439 (1828); *Bramwell v. United States Fidelity & Guaranty Co.*, 269 U.S. 483, 488 (1926); *King v. United States*, 379 U.S. 329, 336-338 (1964); *United States v. Key*, 397 U.S. 322, 324-325 (1970).

[7] This Court's *Holywell* opinion held:

> Whether or not the Bankruptcy Code permits a plan to place a new fiduciary in charge of an estate after confirmation, as the United States contends, we do not believe that a mere substitution occurred in this case. The plan, as quoted above, "declared and established" the new Miami Center Liquidating Trust. It then vested all of the assets of Gould's estate to respondent Smith as trustee. The plan did not simply substitute the trustee for Gould as the fiduciary of the estate. Rather, it created a separate and distinct trust holding the property of the estate and gave the

trustee acting under title 11" and the respondents are collaterally estopped from arguing that Smith was a "bankruptcy trustee," Bank at 1, n. 1.[8]

(c) The Solicitor General and the Petitioner also argued in the proceedings before this Court that assets that generate income should generally be chargeable with the taxes attributable to their income and "Congress has ensured that the duty to report and pay taxes will follow the assets from which the income is realized and from which the tax payment is made," *Petition Of United States For A Writ Of Certiorari*, March 1991 at 10. This Court agreed, 503 U.S. at 52 ("the trustee must pay the tax on the income attributable to the corporate debtors' property").

Since Holywell Corporation and its subsidiaries[9] were severally liable for the payment of taxes as the

---

trustee control of this property. The Bankruptcy Code expressly permits this arrangement. See 11 U.S.C. § 1123(a)(5)(B) (authorizing a plan to transfer "all or any part of the property of the estate to one or more entities, whether organized before or after the confirmation of such plan"). The trustee, therefore, is not acting as the fiduciary of Gould's bankruptcy estate.

[8] In the prior proceedings before this Court, the respondents argued that "[t]o begin with, the Liquidating Trustee is not a 'trustee in a case under title 11 of the United States Code' because that phrase – which is a term of art in the bankruptcy context – refers only to the statutory trustees that may be appointed in cases under Chapter 7, 11, 12, and 13 of the Bankruptcy Code." *Brief In Opposition Of Respondent The Bank of New York*, April 1991 at 17. This Court agreed.

[9] The factual representation of the respondents to this Court is *false* that "Holywell . . . as a result of the confirmation of

members of an affiliated group, Treas. Regulation 1.1502-(6)(a), the creation of the Miami Center Liquidating Trust and the substantive consolidation provision of the Bank's plan was an unlawful scheme to evade taxes and to defraud creditors with valid claims as insiders. Thus, the trustee misappropriated Holywell's cash to pay the claims of creditors against the Miami Center Limited Partnership's estate for which Holywell was not liable and fraudulently conveyed property without consideration.

Alternatively, the tax consequences of the liquidation of the debtor corporations under the plan's substantive consolidation provision prior to the trustee's sale of the Miami Center[10] means that the Internal Revenue Service erroneously asserted against Holywell Corporation & Subsidiaries corporate income taxes attributable to capital gains for the fiscal year ended July 31, 1986. See Bkrtcy. S.D. Fla., *Rule 60(b) Motion To Vacate Order Approving Substantive Consolidation*, November 24, 1993, at 4-5; also,

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the Bank's Plan . . . was thereby given a 'fresh start' and relieved of over $300 million in debts," Bank at 7.

The principal amount of the total claims of creditors allowed against Holywell's estate was $3,369,259.84, and as of October 10, 1985, Holywell and its nondebtor subsidiaries had cash and U.S. Treasury Bills (par value) of $27,808,476.52.

[10] This Court's *Holywell* opinion held "[n]o tax liability becomes due under § 6151 until the time required for making those returns," 503 U.S. at 58. Under the substantive consolidation provision of the Bank's plan, Holywell and its subsidiaries were liquidated upon the transfer of their property as a liquidating dividend to the trustee of the Miami Center Liquidating Trust "for the express purpose of liquidating Gould's estate," 503 U.S. at 56.

26 U.S.C. § 336 (prior to August 1, 1986); *General Utilities and Operating Co. v. Helvering*, 296 U.S. 200, 204 (1935).

CONCLUSION

For the foregoing reasons, and for the reasons stated in our petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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